

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
)	
NICKY LOWE)	CASE NO. WPC-07-0109
)	
)	
)	
RESPONDENT)	

COMMISSIONER’S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “Department”).

II.

Nicky Lowe (hereinafter the “Respondent”) is the owner/developer of an approximately 27-acre residential development, the Grace Haven Subdivision, located between AEDC Road and Love Lane Road in Coffee County (hereinafter the “site”). Service of process may be made on the Respondent at 256 Love Lane Road, Hillsboro, Tennessee 37342. Mr Lowe has many functions and has control over corrective measures on site.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”).

IV.

The Respondent is a “person” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

V.

T.C.A. §69-3-108(b)(1), provides that it is unlawful for any person, except in accordance with the conditions of a valid permit, to carry out any activity which may result in the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the State, including wetlands. These activities

include, but are not limited to: the discharge of dredge or fill material, dredging, stream channel modifications, water withdrawals, wetlands alterations including drainage, and other construction activities which result in the alteration of the waters of the State. State permits for these activities are either §401 Water Quality Certifications or Aquatic Resource Alteration Permits. Additionally, pursuant to Rule 1200-4-7.03(38), "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

VI.

T.C.A. §69-3-108 requires a person to obtain a permit from the Department prior to the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Pursuant to T.C.A. §69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a §401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VII.

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely

that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), site-specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

FACTS

VIII.

On August 7, 2006, personnel with the Division of Water Pollution Control (hereinafter the “Division”) received a complaint regarding wetland alterations at the site. On this day, Division personnel conducted a site investigation and observed that an area exhibiting wetland characteristics was present at the site, and a portion of this area had been filled and ditches cut.

IX.

On August 17, 2006, Division personnel met onsite with the Respondent and confirmed that jurisdictional wetlands were present onsite, and had been altered. Further, Division personnel and the Respondent discussed boundaries of the altered wetland area on site, and the Division notified the Respondent that additional wetlands may be present. Additionally, the Division notified the Respondent that a wetland delineation must be conducted, and an ARAP permit obtained prior to any disturbance. Upon further investigation, it was determined that the Respondent had conducted various activities

resulting in the alteration of jurisdictional wetlands, and no ARAP coverage had been obtained. Also, no TNCGP coverage had been obtained for clearing activities at the site.

X.

On August 31, 2006, the Division issued a Notice of Violation (NOV) to the Respondent for the violations observed during the August 7 and 17, 2006, site visits. The NOV further notified the Respondent that the cut ditches should be filled, the fill material removed, and vegetation established at the wetland area onsite within 15 days of receipt of the NOV.

XI.

On September 18, 2006, the Division received correspondence from the Respondent regarding the August 31, 2006, NOV. The correspondence stated that the ditches cut into the wetland area had been filled, and that trees would be planted.

XII.

On March 22, 2007, the Division visited the site and observed that an approximately 7-acre lake had been constructed at the site. No TNCGP coverage or ARAP coverage had been obtained.

XIII.

On April 11, 2007, the Division issued a second NOV to the Respondent for violations observed during the March 22, 2007, site visit. The NOV further notified the Respondent that a delineation of the wetland area must be conducted, and a restoration

plan developed for the delineated area and mailed to the Division within 30 days of receipt of the NOV.

XIV.

On May 21, 2007, the Division received a wetland delineation and mitigation plan for the site. The delineation determined that approximately 4.74 acres of wetland had been altered due to construction activities at the site, and proposed to provide compensatory mitigation on site. Further, the mitigation plan proposed to place the mitigation areas, once restoration activities are completed, into a permanent Declaration of Restrictions, and will be a component of the property deed. Additionally, the wetland restoration areas were to be monitored annually for 5 years, and provide a survival rate for planted vegetation of 75% after 5 years.

XV.

On July 6, 2007, Division personnel met with the Respondent and the Respondent's consultant onsite to review the May 21, 2007, wetland delineation and proposed restoration plan. The Division had concerns with the proposed mitigation area along Love Lane, and notified the Respondent that alternative mitigation areas should be considered. The Respondent agreed to investigate alternative mitigation opportunities on adjacent property along AEDC Access Road and on the opposite side of Love Lane.

VIOLATIONS

XVI.

By physically altering waters of the state without authorization under an individual ARAP, and by conducting operations without authorization under the TNCGP, the Respondent has violated T.C.A. Sections 69-3-108(a) and (b) and 69-3-114(b), which states:

T.C.A. §69-3-108 (a) and (b):

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
 - (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
 - (2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;
 - (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
 - (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
 - (5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;
 - (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

ORDER AND ASSESSMENT

XVII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-109, 69-3-115, and 69-3-116, I, James H. Fyke, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondent shall, within THIRTY (30) DAYS of receipt of this Order, submit for Division approval, a mitigation plan to provide compensatory mitigation for the 4.74 acres of impacted wetlands located on site, incorporating a mitigation ratio of 3:1. The mitigation plan shall include, but not be limited to, the amount of area proposed for mitigation incorporating a 3:1 ratio, the location of the proposed mitigation, depths of excavation, information on specific plantings including species, size, spacing, monitoring protocol and success criteria, long-term protection methodology, and a schedule of initiation and completion for the proposed activities. The mitigation plan shall incorporate the wetland delineation information contained in the May 10, 2007, delineation performed by the Respondent's consultant, CEC, and shall attempt to provide as much mitigation onsite as achievable. The mitigation plan shall be submitted to the manager of the Division's Columbia Environmental Field Office (CLEFO)

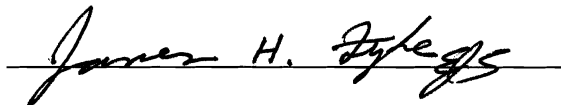
located at 2484 Park Plus Drive, Columbia, Tennessee 37401. A copy shall also be submitted to the manager of the Division's Natural Resources Section located at 401 Church Street, L&C Annex 7th Floor, Nashville, Tennessee 37243.

2. The Respondent shall, by December 31, 2007, complete all activities outlined in the approved mitigation plan, and notify the managers of the Division's CLEFO and E&C of completion.
3. The Respondent is hereby assessed a CIVIL PENALTY in the amount of ONE HUNDRED NINETY NINE THOUSAND SEVEN HUNDRED FIFTY DOLLARS (\$199,750.00).
 - a. The Respondent shall pay FIFTY THOUSAND DOLLARS (\$50,000.00) to the Division within THIRTY (30) DAYS of receipt of this Order.
 - b. The Respondent shall pay FIFTY THOUSAND DOLLARS (\$50,000.00) to the Division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.
 - c. The Respondent shall pay NINETY-NINE THOUSAND SEVEN HUNDRED FIFTY DOLLARS (\$99,750.00) by January 30, 2008, if, and only if, the Respondent fails to comply with Item 2 above in a timely manner.
4. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations.

However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 3rd day of December, 2007.

A handwritten signature in black ink, reading "James H. Fyke", is written over a horizontal line.

James H. Fyke, Commissioner

Department of Environment and Conservation

NOTICE OF RIGHTS

T.C.A. §§69-3-109 and 69-3-115, allow the Respondent to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Office of General Counsel a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The written petition should be sent to the Tennessee Department of Environment and Conservation, Office of General Counsel, at 401 Church Street, L&C Tower 20th Floor, Nashville, Tennessee 37243. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment.

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order

and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low- income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

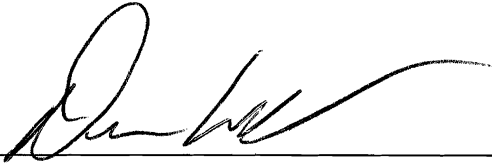
It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the state of Tennessee.

At the conclusion of a hearing the Board has the authority to affirm or modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines (up to \$10,000.00 per day per violation).

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional

damages incurred by the Department including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed, or civil penalty payment,, should be sent to Devin M. Wells, Assistant General Counsel at the address listed below. All other correspondence shall be sent to Paul E. Davis, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number (**WPC-07-0109**) should be written on all correspondence regarding this matter.

A handwritten signature in black ink, appearing to read 'Devin M. Wells', is written over a horizontal line.

Devin M. Wells
Assistant General Counsel
Tennessee Department of
Environment & Conservation
20th Floor L&C Tower
401 Church Street
Nashville, Tennessee 37243-1548